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No. 06-1184

Supreme Court, U.S.
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In The

Supreme Court of the United States

SPRINT NEXTEL CORPORATION AND
T-MOBILE USA, INC.
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In re Petition for Declaratory Ruling Filed By CTIA Regarding Whether Early Termination Fees are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A), FCC WT Docket No. 05-194 6

The issue in this case is whether the Federal Communications Commission ("FCC" or "the Commission") properly interpreted section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), to preempt state regulations prohibiting wireless carriers from collecting state taxes and fees by using line items. Wireless carriers use line items so that they may offer rate plans – such as 600 minutes for $40 per month – nationwide, and collect taxes and fees only from residents of the jurisdiction imposing the tax or fee. State and local governments prohibit the use of line items because, by doing so, they effectively hide the existence of the tax, which typically is rolled into a monthly rate if it cannot be listed separately. In addition, high tax jurisdictions may effectively export the tax by prohibiting line items because carriers are likely to respond to such prohibitions by increasing their rates nationwide rather than adopting different rate plans for different jurisdictions.

In response to this Court's invitation, the Solicitor General has explained in detail why the Eleventh Circuit erred by overturning the FCC's conclusion that state regulation of line items is preempted. The Solicitor General nevertheless recommends against further review at this time because the FCC might decide to preempt state regulations prohibiting the use of line items under a distinct theory. Rather than waiting for an opportunity to address a different issue, the Court should grant review now in order to clear up significant confusion in the lower courts concerning the role of the presumption against

preemption in cases involving agency decisions entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

I. This Case Presents An Opportunity To Address The Important And Recurring Issue Whether The Presumption Against Preemption Affects Review Of Agency Decisions Entitled To *Chevron* Deference.

The Solicitor General rightly stated (SG Br. 11) that the Eleventh Circuit "erred by not according appropriate deference to the FCC's reasonable construction of Section 332(c)(3)(A)." The statutory construction issue presented is whether line items – "discrete charge[s] identified separately on an end user's bill" (Pet. App. 65a) – are "rates charged" within the meaning of the statute. The FCC correctly concluded that the phrase is ambiguous, but determined that "rates charged" is best interpreted to include separate charges on wireless bills. As the Solicitor General explained, that interpretation is not mandated by Congress's use of the phrase "rates charged," but is entirely consistent with the extensive history involving regulation of the "rate structures" established by wireless carriers and other regulated entities. SG Br. 13-14.

The Solicitor General also correctly concluded (Br. 12) that the court of appeals' invocation of the presumption against preemption "does not justify the court's failure to defer." In *Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 744 (1996), this Court gave

Chevron deference to an agency interpretation that extended a statute's preemptive effect without regard to the presumption against preemption. As the Solicitor General explained (SG Br. 12), that approach is sensible where – as in this case and *Smiley* – there is no question that Congress intended the statute at issue to have preemptive effect and gave a federal agency authority to interpret the statute.

This case therefore presents an important and recurring issue involving federal-state relations: what role, if any, does the presumption against preemption play in cases where an agency's interpretation of a statute with preemptive effect is subject to *Chevron*. The parties briefed that issue last Term in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 & n.13 (2007), but the Court did not address it because it concluded that the National Bank Act itself – without regard to the interpretation provided by the Office of the Comptroller of the Currency – preempted the state regulation at issue. The dissenters disagreed with the Court's conclusion that the statute was clear, and would have held that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." *Id.* at 1584.

As *Watters* illustrates, the question presented here is a recurring issue that arises under a wide array of statutes administered by federal agencies. The issue is squarely presented here because, notwithstanding the Eleventh Circuit's conclusion

that the statute is unambiguous (Pet. App. 25a), it is not. As the D.C. Circuit correctly explained, section 332(c)(3)(A) "leaves its key terms undefined" and "never states what constitutes rate or entry regulation." *Cellular Telecomms. Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). This case therefore presents an opportunity for the Court to address the narrow but important issue that it did not reach in *Watters*.

II. The Court Should Not Decline The Opportunity To Clarify The Relationship Between The Presumption Against Preemption And *Chevron* Because The FCC Might Preempt State Regulation Of Line Items Using A Distinct Theory.

The Solicitor General recommends against review at this time because the FCC might someday reach the same result – preempting state rules prohibiting the use of line items – by employing conflict preemption principles. As the Solicitor General states, under *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982), and *City of New York v. FCC*, 486 U.S. 57 (1988), federal agencies acting within the scope of their authority may preempt state laws notwithstanding the absence of any statement by Congress that preemption is warranted. Rather, a federal agency may preempt based on its conclusion that a state or local regulation frustrates the achievement of an important federal goal.

As an initial matter, there is little doubt that the Eleventh Circuit would reverse if the FCC employed its conflict preemption authority in that manner. The court held that Congress "unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. As we explained (Pet. 20-21), that holding is based on a misreading of Congress's use of the phrase "other terms and conditions" in section 332(c)(3)(A). Notwithstanding the Solicitor General's dismissal of the court of appeals' statement that Congress preserved state authority as "dicta" (SG Br. 21 n.7), it seems likely that a panel of the Eleventh Circuit would conclude that its statement that Congress "unambiguously preserved the ability of the States to regulate the use of line items" (Pet. App. 25a) precluded the FCC from preempting state regulation of line items. Moreover, although conflict preemption is indeed distinct from express preemption of the sort at issue here, the Eleventh Circuit is likely to perceive preemption by a federal agency on the ground that it believes state law is frustrating the achievement of a federal goal as being more troubling than preemption based on interpretation of a federal statute that Congress plainly intended to have preemptive effect. And as we explained (Pet. 21), respondents would be able to seek review in that court – the FCC will not have the opportunity to test an alternative preemption theory in a court not bound by the decision in this case.

In the meantime, the FCC and other courts will unnecessarily address issues that would be resolved

by a decision by this Court upholding the FCC's interpretation of section 332(c)(3)(A). As we noted, the FCC explicitly preempted regulations in Vermont, Indiana, and Georgia (Pet. App. 68a-69a n.87), and issues involving state prohibitions on line items subsequently have arisen in Washington, Kentucky, and Texas (Pet. Reply 8-10). But because none of those cases arises on direct review of the FCC's preemption decision, it is not clear what weight the courts will or should give the agency's interpretation of the statute, which the Eleventh Circuit vacated in this case. Accordingly, those cases will not necessarily provide an opportunity for the Court to address the narrow, but recurring and important, issue presented here.

In addition, class action lawsuits are pending around the country involving the legality under state law of early termination fees – fees assessed by wireless carriers when subscribers cancel before the end of the one- or two-year term common to wireless contracts. In 2005, a state court in South Carolina asked the FCC to determine whether early termination fees are "rates charged" within the meaning of section 332(c)(3)(A), and the FCC opened a general proceeding to address that issue. *In re Petition for Declaratory Ruling Filed By CTIA Regarding Whether Early Termination Fees are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A)*, FCC WT Docket No. 05-194. But the FCC has not resolved the issue, in large part due to the Eleventh Circuit's invalidation of its interpretation of "rates charged" in this case. Some

state courts have grown tired of waiting for the FCC to decide the early termination fee issue, including an Alameda County, California, class action involving thousands of plaintiffs, where the court has scheduled the case for trial in March 2008. *In re Cellphone Termination Fee Cases*, No. J.C.C.P. 4332 (Cal. Super. Ct. Nov. 30, 2007). The issue presented here – involving the meaning of "rates charged" – is likely to affect the resolution of the early termination fee controversy, and is much more likely to do so than would a decision involving the FCC's exercise of its authority to preempt using conflict preemption principles.

* * * * *

This case presents an important and recurring issue involving state and federal relations – an issue this Court was asked to address, but did not reach, last Term in *Watters*. This Court should not wait for an opportunity to address a distinct preemption issue that does not involve the relationship between the presumption against preemption and *Chevron*. Instead, the Court should provide clarity to federal agencies and the lower courts by deciding the question presented by this case – which is simultaneously narrow, yet important and recurring.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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